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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CITY OF LOS ANGELES, CALIFORNIA; CITY OF SAN ANTONIO, TEXAS; CITY OF INGLEWOOD, CALIFORNIA; COUNTY OF SANTA CLARA, CALIFORNIA; CITY OF STAMFORD, CONNECTICUT; LAURA CHICK, individually and in her official capacity as a Member of the Los Angeles City Council; MIKE FEUER, individually and in his official capacity as a Member of the Los Angeles City Council; MIKE HERNANDEZ, individually and in his official capacity as a Member of the Los Angeles City Council; NATE HOLDEN, individually and in his official capacity as a Member of the Los Angeles City Council; CINDY MISCIKOWSKY individually and in her official capacity as a Member of the Los Angeles City Council; NICK PACHECO individually, and in his official capacity as a Member of the Los Angeles City Council; ALEX PADILLA, individually and in his official capacity as a Member of the Los Angeles City Council; RITA WALTERS, individually and in her official capacity as a Member of the Los Angeles City Council; MARK RIDLEY-THOMAS, individually and in his official capacity as a Member of the Los Angeles City Council; and FERNANDO FERRER, individually and in his official capacity as President of Bronx Borough, New York City, New York, Plaintiffs, v. DONALD EVANS, SECRETARY OF THE DEPARTMENT OF COMMERCE, in his official capacity; and DEPARTMENT OF COMMERCE, Defendants.	Case No. **COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

City of Los Angeles, California; City of San Antonio, Texas; City of Inglewood, California; City of Stamford, Connecticut; County of Santa Clara, California; Laura Chick, Mike Feuer; Mike Hernandez; Nate Holden; Cindy Miscikowsky; Nick Pacheco; Alex Padilla; Rita

Walters, Mark Ridley-Thomas, and Fernando Ferrer (collectively, "Plaintiffs") allege:

JURISDICTION AND VENUE

This Court has jurisdiction over this action under 28 U.S.C. § 1331. The cause of action arises under the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.* ("APA"). The Plaintiffs seek declaratory and injunctive relief against Secretary of Commerce Donald Evans and the Department of Commerce as a result of the promulgation of an invalid rule. 5 U.S.C. §§ 553, 701-706; 28 U.S.C. §§ 2201, 2202.

Venue is proper in this district under 28 U.S.C. § 1391(e).

PARTIES

Plaintiff City of Los Angeles, California suffered for the last decade from the adverse affects of the undercount of its population resulting from the inaccuracies of the 1990 Census. Its population was undercounted by at least 138,808 persons, or 3.8% of the City's total population. As a majority minority-population City, the City of Los Angeles was particularly affected by the differential undercount of minorities. The post-enumeration survey data for certain population groups such as Hispanic males living in rental housing in the City showed an undercount of 13%, and for African-American males living in rental housing, the survey indicated a 10% undercount. Minority groups continue to account for an increasing percentage of the City's total population; in 1994 they accounted for 66.5% of the City's population, and in 1997, minority groups comprised 69.3% of the population. Because of the differential undercount in the 1990 Census, the City of Los Angeles did not receive approximately $120 million in federal funds that it would have received had accurate census data been used. The City of Los Angeles is suffering legal wrong and is an aggrieved party as a result of the unlawful actions of defendants Secretary Evans and the Department of Commerce and has a substantial interest in having the determination to release statistically adjusted figures made by skilled and experienced professionals through a process that is insulated from partisan politics.

Plaintiff City of San Antonio, Texas has suffered for the last decade from the adverse affects of the undercount of its population resulting from the inaccuracies of the 1990 Census. The 1990 census missed 38,166 persons, or about 3.9% of the City's total official population of 935,933 persons. African-Americans, Hispanics, and Asian/Pacific Islanders – groups that are far more likely to be undercounted – comprised about 62.6% of the City's population in 1990. Since 1990, Hispanic and African-American populations have increased, and the City believes that there is a significant risk of an undercount in 2000 if the census results are not statistically

adjusted. Because of the differential undercount in the 1990 Census, the City of San Antonio did not receive approximately $21.3 million in federal funds that it would have received had accurate census data been used. The City of San Antonio is suffering legal wrong and is an aggrieved party as a result of the unlawful actions of defendants Secretary Evans and the Department of Commerce and has a substantial interest in having the determination to release statistically adjusted figures made by skilled and experienced professionals through a process that is insulated from partisan politics.

Plaintiff City of Inglewood, California has suffered for the last decade from the adverse affects of the undercount of its population resulting from the inaccuracies of the 1990 Census. The City of Inglewood's population was undercounted by 6.3% in the 1990 Census. Its minority population comprised 94% of its total population in 1990. Because minority groups are traditionally undercounted, and Inglewood's minority population continues to grow, Inglewood believes that an accurate count of Inglewood's population can only be achieved by using statistical adjustment to census data collected through traditional enumeration methods. Because of the differential undercount in the 1990 Census, the City of Inglewood did not receive approximately $9.6 million in federal funds that it would have received had accurate census data been used. The City of Inglewood is suffering legal wrong and is an aggrieved party as a result of the unlawful actions of defendants Secretary Evans and the Department of Commerce and has a substantial interest in having the determination to release statistically adjusted figures made by skilled and experienced professionals through a process that is insulated from partisan politics.

Plaintiff County of Santa Clara, California has suffered for the last decade from the adverse affects of the undercount of its population resulting from the inaccuracies of the 1990 Census. The population of the County was undercounted by 2.19% in the 1990 Census, resulting in 32,886 persons being missed. People living below the poverty line in the County were undercounted at a rate of 30% in the 1990 Census. Because of the differential undercount in the 1990 Census, the County did not receive approximately $49.3 million in federal funds that it would have received had accurate census data been used. The County is suffering legal wrong and is an aggrieved party as a result of the unlawful actions of defendants Secretary Evans and the Department of Commerce and has a substantial interest in having the determination to release statistically adjusted figures made by skilled and experienced professionals through a process that is insulated from partisan politics.

Plaintiff City of Stamford, Connecticut has suffered for the last decade from the adverse affects of the undercount of its population resulting from the inaccuracies of the 1990 Census. The City had concerns with the accuracy of the 1990 census data, and, on information and belief, alleges that minorities, renters, the poor and children were disproportionately undercounted. The City believes that minorities will once again be undercounted in Census 2000 if the results are not statistically adjusted. The City of Stamford is suffering legal wrong and is an aggrieved party as a result of the unlawful actions of defendants Secretary Evans and the Department of Commerce and has a substantial interest in having the determination to release statistically adjusted figures

made by skilled and experienced professionals through a process that is insulated from partisan politics.

Plaintiff Laura Chick is a member of the Los Angeles City Council. She resides and votes in the City of Los Angeles. She has an interest in having the most accurate census data available for congressional, state, and local redistricting so that her vote is not diluted by residing in a district that was drawn using inaccurate population data. Further, she has an interest in running for elected office in a voting district that has been drawn using accurate census data. Chick is suffering legal wrong and is an aggrieved party as a result of the unlawful actions of defendants Secretary Evans and the Department of Commerce and has a substantial interest in having the determination to release statistically adjusted figures made by skilled and experienced professionals through a process that is insulated from partisan politics.

Plaintiff Mark Ridley-Thomas is a member of the Los Angeles City Council. He resides and votes in the City of Los Angeles. Ridley-Thomas represents a majority minority district, many of the residents of which are likely to be missed by the traditional enumeration methods used by the Census. He is interested in having the most accurate census data available for congressional, state, and local redistricting so that his vote is not diluted by residing in a district that was drawn using inaccurate population data. Further, he has an interest in running for elected office in a voting district that has been drawn using accurate census data. Ridley-Thomas is suffering legal wrong and is an aggrieved party as a result of the unlawful actions of defendants Secretary Evans and the Department of Commerce and has a substantial interest in having the determination to release statistically adjusted figures made by skilled and experienced professionals through a process that is insulated from partisan politics.

Plaintiff Mike Feuer is a member of the Los Angeles City Council. He resides and votes in the City of Los Angeles. He is interested in having the most accurate census data available for congressional, state, and local redistricting so that his vote is not diluted by residing in a district that was drawn using inaccurate population data. Further, he has an interest in running for elected office in a voting district that has been drawn using accurate census data. Feuer is suffering legal wrong and is an aggrieved party as a result of the unlawful actions of defendants Secretary Evans and the Department of Commerce and has a substantial interest in having the determination to release statistically adjusted figures made by skilled and experienced professionals through a process that is insulated from partisan politics.

Plaintiff Mike Hernandez is a member of the Los Angeles City Council. He resides and votes in the City of Los Angeles. Hernandez represents a majority minority district, many of the residents of which are likely to be missed by the traditional enumeration methods used by the Census. He is interested in having the most accurate census data available for congressional, state, and local redistricting so that his vote is not diluted by residing in a district that was drawn using inaccurate population data. Further, he has an interest in running for elected office in a voting

district that has been drawn using accurate census data. Hernandez is suffering legal wrong and is an aggrieved party as a result of the unlawful actions of defendants Secretary Evans and the Department of Commerce and has a substantial interest in having the determination to release statistically adjusted figures made by skilled and experienced professionals through a process that is insulated from partisan politics.

Plaintiff Nate Holden is a member of the Los Angeles City Council. He resides and votes in the City of Los Angeles. Holden represents a majority minority district, many of the residents of which are likely to be missed by the traditional enumeration methods used by the Census. He is interested in having the most accurate census data available for congressional, state, and local redistricting so that his vote is not diluted by residing in a district that was drawn using inaccurate population data. Further, he has an interest in running for elected office in a voting district that has been drawn using accurate census data. Holden is suffering legal wrong and is an aggrieved party as a result of the unlawful actions of defendants Secretary Evans and the Department of Commerce and has a substantial interest in having the determination to release statistically adjusted figures made by skilled and experienced professionals through a process that is insulated from partisan politics.

. Plaintiff Cindy Miscikowsky is a member of the Los Angeles City Council. She resides and votes in the City of Los Angeles. She is interested in having the most accurate census data available for congressional, state, and local redistricting so that her vote is not diluted by residing in a district that was drawn using inaccurate population data. Further, she has an interest in running for elected office in a voting district that has been drawn using accurate census data. Miscikowsky is suffering legal wrong and is an aggrieved party as a result of the unlawful actions of defendants Secretary Evans and the Department of Commerce and has a substantial interest in having the determination to release statistically adjusted figures made by skilled and experienced professionals through a process that is insulated from partisan politics.

Plaintiff Nick Pacheco is a member of the Los Angeles City Council. He resides and votes in the City of Los Angeles. Pacheco represents a majority minority district, many of the residents of which are likely to be missed by the traditional enumeration methods used by the Census. He is interested in having the most accurate census data available for congressional, state, and local redistricting so that his vote is not diluted by residing in a district that was drawn using inaccurate population data. Further, he has an interest in running for elected office in a voting district that has been drawn using accurate census data. Pacheco is suffering legal wrong and is an aggrieved party as a result of the unlawful actions of defendants Secretary Evans and the Department of Commerce and has a substantial interest in having the determination to release statistically adjusted figures made by skilled and experienced professionals through a process that is insulated from partisan politics.

Plaintiff Alex Padilla is a member of the Los Angeles City Council. He resides and votes in the

City of Los Angeles. Padilla represents a majority minority district, many of the residents of which are likely to be missed by the traditional enumeration methods used by the Census. He is interested in having the most accurate census data available for congressional, state, and local redistricting so that his vote is not diluted by residing in a district that was drawn using inaccurate population data. Further, he has an interest in running for elected office in a voting district that has been drawn using accurate census data. Padilla is suffering legal wrong and is an aggrieved party as a result of the unlawful actions of defendants Secretary Evans and the Department of Commerce and has a substantial interest in having the determination to release statistically adjusted figures made by skilled and experienced professionals through a process that is insulated from partisan politics.

Plaintiff Rita Walters is a member of the Los Angeles City Council. She resides and votes in the City of Los Angeles. Walters represents a majority minority district, many of the residents of which are likely to be missed by the traditional enumeration methods used by the Census. She is interested in having the most accurate census data available for congressional, state, and local redistricting so that her vote is not diluted by residing in a district that was drawn using inaccurate population data. Further, she has an interest in running for elected office in a voting district that has been drawn using accurate census data. Walters is suffering legal wrong and is an aggrieved party as a result of the unlawful actions of defendants Secretary Evans and the Department of Commerce and has a substantial interest in having the determination to release statistically adjusted figures made by skilled and experienced professionals through a process that is insulated from partisan politics.

Plaintiff Fernando Ferrer is President of the Bronx Borough, New York, New York. He resides and votes in the Bronx Borough of New York. He represents a borough that has a substantial minority population, many of the residents of which are likely to be missed by the traditional enumeration methods used by the Census. He is interested in having the most accurate census data available for congressional, state, and local redistricting so that his vote is not diluted by residing in a district that was drawn using inaccurate population data. Further, he has an interest in running for elected office in a voting district that has been drawn using accurate census data. Ferrer is suffering legal wrong and is an aggrieved party as a result of the unlawful actions of defendants Secretary Evans and the Department of Commerce and has a substantial interest in having the determination to release statistically adjusted figures made by skilled and experienced professionals through a process that is insulated from partisan politics.

Defendant Donald Evans is the Secretary of the Department of Commerce. Secretary Evans promulgated and signed a final rule on February 16, 2001 ("Evans Rule") purporting to revise and revoke, in part, 15 C.F.R. Part 101. The Evans Rule is the subject of this litigation.

Defendant Department of Commerce is a federal agency that has the responsibility of conducting the 2000 Census. The Bureau of the Census, which has the specific task of implementing the

2000 Census, is under the control of the Department of Commerce and Secretary Evans.

ALLEGATIONS

The Census Act requires that census data to be used by States and localities for congressional, state, and local redistricting be transmitted by April 1, 2001. 13. U.S.C. § 141 (c).

On October 6, 2000, the former Secretary of Commerce Daley issued a final rule delegating to the Director of the Census the final decision making authority to determine whether statistically adjusted census figures would be used in calculating the tabulations of population reported to the States and localities pursuant to 13 U.S.C. § 141(c). 15 C.F.R. Part 101 (attached hereto as Exhibit A). This final rule was promulgated according to the notice and comment procedures set forth in the Administrative Procedure Act.

The rule provides that the Director of the Census shall make the final determination whether statistically adjusted figures should be released only after he has received the recommendation and report from a committee of career professionals in the Bureau of the Census. 15 C.F.R. § 101.1(a)(3). The rule further provides that this committee – referred to as the Executive Steering Committee for A.C.E. ("Accuracy and Coverage Evaluation") Policy ("ESCAP") – shall prepare a written report to the Director of the Census with a recommendation on whether to use the adjusted census data because it is more accurate that the data produced by traditional methods of enumeration. 15 C.F.R. § 101.1(b)(1), (2). This report and recommendation shall be released to the public. *Id.*

The rule also provides that if the ESCAP recommends that the statistically adjusted figures should be released, but the Director of the Census rejects that recommendation, the statistically adjusted figures shall nonetheless be made available to the States and localities for redistricting purposes. 15 C.F.R. § 101.2(b).

One of the purposes of the rule was to establish a decision making process governing the release of adjusted figures that would be insulated from partisan politics. The Supplementary Information to the 15 C.F.R. Part 101 states that the decision regarding the release of statistically adjusted figures is a decision that "turns entirely on operational and methodological implementation within the scientific expertise of the Bureau of the Census, and it is important to avoid even the appearance that considerations other than those relating to statistical science are being taken into account." 15 C.F.R. Part 101 Supplementary Information (attached hereto as Exhibit B).

On February 16, 2001, Donald Evans, the newly appointed Secretary of Commerce, issued a rule, without notice and comment, revoking the delegation of authority to the Director of the Census to make the final determination whether statistically adjusted figures should be released to the States and localities for redistricting purposes ("Evans Rule") (attached hereto as Exhibit C). The Supplementary Information further states that the Secretary "might also seek the advice of other [non-Census Bureau] individuals with knowledge of this issue. " *Id.*

The Evans Rule also removes Section 101.2 in its entirety. Section 101.2(b) guaranteed that the statistically adjusted census data reviewed by ESCAP would be released to the public even if the Director of the Census decided against its release.

By taking the final determination regarding the release of adjusted figures away from the Director of the Census and giving it to the Secretary of Commerce, and whoever else he consults with, the Evans Rule ensures that partisan politics, rather than science, will drive the decision whether to release the adjusted figures. The Evans Rule completely undermines the purpose of 15 C.F.R. Part 101, which is to insulate from partisan politics the final determination of which census data should be released, by effectively removing from the decision-making process those most qualified to make the final determination – the career professionals at the Census Bureau.

Promulgation of the Evans Rule is final agency action for the purposes of the Administrative Procedure Act. It is due to be published in the Federal Register in the next few days. Once published, it will become immediately effective.

The Evans Rule is a substantive, or legislative, rule that requires that it be subject to a notice and comment period before it is promulgated and becomes effective. Moreover, the existing regulations at 15 C.F.R. § 101 that the Evans Rule purports to revoke, in part, are substantive, or legislative, rules that cannot be revoked until such revocation has been subject to a notice and comment period. There has been no notice and comment period at all.

The Plaintiffs are aggrieved parties as a result of the unlawful actions of Secretary Evans and the Department of Commerce. These legal wrongs committed by the defendants include without limitation:

a) Deprivation of the right to notice and comment guaranteed by Section 553 of the APA;

b) Prohibition of the release of the statistically adjusted census data if Secretary Evans rejects the recommendation of the ESCAP to use the adjusted numbers;

c) Deprivation of the right to an impartial scientifically based decision as to whether to use statistically adjusted census date for the tabulations of the population reported to the States and localities pursuant to 13 U.S.C. § 141(c).

Plaintiffs interest in both the substance and process of the decision whether to release the census figures determined by the ESCAP to be the most accurate fall inside the zone of interests protected or regulated by the Census Act and 15 C.F.R. Part 101.

Further, if the Evans Rule had been promulgated with proper notice and comment, Los Angeles would have submitted a comment opposing the rule. Los Angeles has suffered injury having been denied the opportunity to comment as required by law.

The Plaintiffs will be harmed if the most accurate census data available is not released and used for the purposes of redistricting and distribution of federal funds. If accurate census data is not release and used, the Plaintiff municipalities will be deprived of their fair share of federal funds, the distribution of which is largely based on population counts, and will be frustrated in drawing local voting districts that are roughly equal in terms of population. The Plaintiffs individuals will suffer vote dilution if congressional, state and local voting districts are drawn using inaccurate census data that results in voting districts that are not roughly equal. Further, as office holders, the Plaintiff individuals will be further harmed in seeking elected office in voting districts that are not drawn using accurate census data.

Plaintiffs will suffer irreparable harm if the Evans Rule is implemented because it injects improper and irrelevant political consideration into the determination whether statistically adjusted figures should be released – contrary to the purpose of 15 C.F.R. Part 101 – and deprives plaintiffs of their rights to notice and comment and to obtain the most accurate census data possible.

CLAIM FOR RELIEF

(Declaratory and Injunctive Relief)

Plaintiffs incorporate herein paragraphs 1-33.

Revocation of exiting and duly promulgated provisions of 15 C.F.R. 101 without conducting the requisite notice and opportunity to comment constitutes an abuse of regulatory power, is arbitrary and an abuse of discretion, and otherwise not in accordance with the law.

Promulgation of the Evans Rule without conducting the requisite notice and opportunity to comment constitutes an abuse of regulatory power, is arbitrary and an abuse of discretion, and otherwise not in accordance with the law.

Plaintiffs are aggrieved by the violations of law alleged herein. Unless the Court issues a declaratory judgment resolving the legal issues with respect to the violations alleged, Plaintiffs will be substantially injured. Plaintiffs have no prompt, adequate and effective remedy at law and this action is the only means available to them for protection of their rights.

The issues raised by this action are appropriate and ripe for judicial resolution. Such issues consist solely of issues of law amenable to prompt declaratory and injunctive relief.

PRAYER FOR RELIEF

WHEREFORE, PLAINTIFFS pray for a temporary restraining order and

preliminary and permanent injunctions, and demands judgment against the defendants as follows:

a) Declaring that the Evans Rule, which is final agency action, is invalid because it was not promulgated with notice and comment, as required under the Administrative Procedure Act, is arbitrary and an abuse of discretion and is, therefore, null and void and of no effect;

b) Preliminarily and permanently enjoining the Evans Rule from becoming effective and/or enjoining defendants from implementing the Evans Rule;

c) Awarding costs, expenses and fees, including attorney's fees, incurred in this litigation; and

d) Ordering such further relief as the Court may deem just and proper.

Dated: February 21, 2001
Respectfully submitted,

BRIAN S. CURREY
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By

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CITY OF LOS ANGELES; CITY OF SAN ANTONIO, TEXAS; CITY OF INGLEWOOD, CALIFORNIA; COUNTY OF SANTA CLARA, CALIFORNIA; CITY OF STAMFORD, CONNECTICUT; LAURA CHICK, individually and in her official capacity as a Member of the Los Angeles City Council; MIKE FEUER, individually and in his official capacity as a Member of the Los Angeles City Council; MIKE HERNANDEZ, individually and in his official capacity as a Member of the Los Angeles City Council; NATE HOLDEN, individually and in his official capacity as a Member of the Los Angeles City Council; CINDY MISCIKOWSKI individually and in her official capacity as a Member of the Los Angeles City Council; NICK PACHECO individually, and in his official capacity as a Member of the Los Angeles City Council; ALEX PADILLA, individually and in his official capacity as a Member of the Los Angeles City Council; RITA WALTERS, individually and in her official capacity as a Member of the Los Angeles City Council; MARK RIDLEY-THOMAS, individually and in his official capacity as a Member of the Los Angeles City Council; FERNANDO FERRER, President of Bronx Borough, New York City, New York, Plaintiffs, v. DONALD EVANS, SECRETARY OF THE DEPARTMENT OF COMMERCE, in his official capacity; DEPARTMENT OF COMMERCE, Defendants.	Case No. CV 01-01671 GAF(MCx) **PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF EX PARTE APPLICATION FOR TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE RE PRELIMINARY INJUNCTION; DECLARATION OF BRIAN S. CURREY**

INTRODUCTION AND SUMMARY OF ARGUMENT.

Under an existing regulation of the United States Department of Commerce, 15 C.F.R. Part 101 -- adopted after notice and comment -- the cities, counties, and public officials bringing this action have a legal right to the release of the most accurate census data possible, as

determined by experts at the United States Census Bureau on the basis of statistical science, without regard to irrelevant partisan political concerns. These Plaintiffs need accurate census data to ensure they receive their fair share of the $185 billion in federal funds distributed each year on the basis of population, and to ensure that accurate population data is available for congressional, legislative, and their own local redistricting.

Unless this Court intervenes, however, that right to accurate census data will evaporate. In its place, Secretary of Commerce Donald Evans proposed a new rule at 5:00 p.m. on the Friday before a three-day weekend -- set to become effective in a matter of days without the notice and comment required by the Administrative Procedure Act -- that makes *politics* -- not accuracy or statistical science -- the most important determinant of which data will be released. If the new rule is allowed to take effect, the determination of which data is most accurate, and the decision whether to release corrected data, will be made by the wrong person for the wrong reasons. All of this could take place within days. Because the proposed new rule violates the Administrative Procedure Act's requirement that it be the subject of notice and comment, and because its implementation would cause immediate, irreparable injury to Plaintiffs, this Court should issue a temporary restraining order prohibiting the Secretary from making the rule effective or implementing it. This Court has express statutory authority to enter such an order under 5 U.S.C. § 705.

The Constitution requires a census every ten years for purposes of congressional reapportionment. U.S. Const. art. I § 2, cl. 3. The resulting decennial census figures are also used for a host of other purposes, including local and congressional redistricting and the disbursement of federal funds. *See* 13 U.S.C. § 141(c). (S*ee also* U.S. Dep't of Commerce, Bureau of the Census Report to Congress -- The Plan for Census 2000 (Aug. 1997) ("Census

2000, Report"), excerpted as Exhibit A to Declaration of Brian S. Currey ("Currey Declaration") which is attached hereto.) The goal of the census is to count each and every person in this country. The census, however, has never been able to count every American. Since 1940 -- when the Census Bureau began measuring the number of people it failed to count -- the Bureau has documented an undercount. *See Department of Commerce v. United States House of Representatives*, 525 U.S. 316, 322, 119 S. Ct. 765, 769, 142 L. Ed. 2d 797 (1999). The undercount has disproportionately manifested itself in certain groups, such as minorities, children, and renters. *Id.* at 322-23. For instance, between 1940 and 1980, while the undercount of the general population apparently decreased, the undercount of African-Americans was more than four times the national average. *Wisconsin v. City of New York*, 517 U.S. 1, 7 116 S. Ct. 1091, 1095, 134 L. Ed. 2d 167 (1996) ("In the 1980 census, for example, the overall [net] undercount was estimated at 1.2%, and the undercount of blacks was estimated at 4.9%"). This disproportionate undercount of certain identifiable groups is known as a "differential undercount."

"Because the heavily undercounted groups are not evenly distributed over the country, the differential rates of undercounting produce divergences between the actual relative population of particular areas and those indicated by the census." *Kirkpatrick v. Preisler*, 394 U.S. 526, 540, 89 S. Ct. 1225, 1233, 22 L. Ed. 2d 519 (1969) (Fortas, J., concurring). These "particular areas" include urban centers such as Los Angeles and the other jurisdictions bringing this suit. These cities and counties are home to recent immigrants, growing minority populations, the poor, the homeless, and disproportionately large numbers of children, all of whom are more difficult to count then the rest of the population. (*See* Census 2000 Report, Currey Decl. Exh. A.) (setting forth undercount rates for various sectors of the population in the 1990 census).

Although Census 2000 improved the coverage of population and reduced the net national undercount from 1.6% in 1990 to 1.4%, a differential undercount still exists. (*See* Prepared Statement of William G. Barron, Acting Director of U.S. Bureau of Census, Feb. 14, 2001, at 2, attached as Exhibit B to Currey Declaration.)

Differential undercounting has a devastating effect on the cities and counties where the undercounted reside. Unless the differential undercount is corrected -- through an adjustment based on statistical sampling -- these jurisdictions will continue to be deprived of their fair share of federal funds -- for schools, crime prevention, health care, transportation and a host of other functions -- that are distributed on the basis of population data. In addition, residents of these areas will continue to be denied an equal voice in their government. (Census 2000 Report, Currey Decl. Exh. A.) Congressional, state legislative, and local redistricting is based (in whole or in part) on official census data. If a portion of the population of a district is disproportionately undercounted, more people will reside in that district than in others that are supposed to have the same population. The dilution of their votes means that residents of those districts -- such as the individual city council members who have joined this suit -- will be denied the guarantee of "one person-one vote."

The differential undercount has long been a concern of Los Angeles and the other cities and counties bringing suit here. The uncorrected differential undercount in the 1990 census cost Los Angeles alone an estimated $120 million in federal funding. (*See* Affidavit of Jessica F. Heinz, attached as Exhibit C to the Currey Declaration.) Los Angeles and other governmental plaintiffs intervened in *Department of Commerce*, 525 U.S. 316, on behalf of the Commerce Department (which includes the Bureau of the Census), in an effort to ensure that differential undercounting could be reduced through the use of a statistically based adjustment technique

known as "statistical sampling." In that case, the Supreme Court held that the Census Act prohibited the use of statistically adjusted census results for purposes of reapportionment of congressional seats among the several states (*i.e.*, how many congressional representatives each state gets). 525 U.S. at 334. The Supreme Court stated, however, that the Census Act *required* the use of statistical sampling for purposes other than apportionment, if "feasible." 525 U.S. at 341. These purposes include redistricting and the allocation of federal funds. In June 2000, then-Secretary of Commerce Daley determined that, for Census 2000, statistical sampling was "feasible." (Memorandum dated June 13, 2000 from Secretary Daley to Kenneth Prewitt, attached as Exhibit D to Currey Declaration.)

In order to measure the undercount in Census 2000, the Bureau conducted a post-census Accuracy and Coverage Evaluation ("A.C.E."), in which it surveyed 314,000 housing units across the country to determine how many people were missed in the census and how many were double counted. (*See* Barron Testimony at 2, Currey Decl. Exh. B.). The Bureau employed statistical methods using the A.C.E. data to determine the extent of the undercount. Under the existing regulation, a twelve-member committee comprised of senior career professionals at the Census Bureau, known as the Executive Steering Committee for Accuracy and Coverage Evaluation Policy ("ESCAP"), is charged with recommending whether using the A.C.E. to adjust the census figures would improve the census results for use in redistricting. It is still analyzing the results of the census and the A.C.E., and is scheduled to make its recommendation by February 28. A decision must be made soon because the Census Act requires that all tabulations to be used by the states and localities for redistricting purposes must be released by April 1, 2001. *See* 13 U.S.C. § 141(c). 1

Unfortunately, the effort to reduce the differential undercount has fallen victim to

partisan politics. Newt Gingrich, for example, opposed correction of the undercount through statistical sampling because he thought it would advantage Democrats. That view is shared by many Republican House leaders. (*See, e.g.,* John Mercurio, "Clinton May Use Recess to Appoint New Census Chief," Roll Call, Jan. 15, 1998, attached as Exhibit F to the Currey Declaration.) The theory, apparently, is that because the undercounted supposedly reside in areas that vote Democratic, Democrats would benefit. Even though that theory is overly simplistic -- it ignores the fact that many of the undercounted can't vote (illegal immigrants and children) or don't vote, ignores the impact of other voters and other factors (such as who controls the redistricting), and ignores the obvious concept that counting people does not change the way they vote -- it seems to have taken hold in Washington, D.C. The result has been constant partisan sparring. Meanwhile, local governments and their residents -- far outside the Washington Beltway -- continue to suffer injury as a result of the invidious differential undercount.

In order to ensure that the final decision regarding the release of statistically adjusted figures would be insulated from partisan politics, former Commerce Secretary Daley proposed a regulation, since adopted as the existing rule," delegating the final decision to the Census Director, who would make his decision only after receiving the report and recommendation of the ESCAP. The existing rule makes that decision unreviewable by the Secretary of Commerce. Although Secretary Daley had determined that using statistical sampling to provide the most accurate census figures was feasible, the ESCAP and Census Director still had to determine whether the A.C.E. was operationally and technically sound, whether the A.C.E. had, in fact, produced the most accurate census figures. (*See* U.S. Dep't of Commerce Press Release, "U.S. Commerce Secretary William M. Daley Delegates Decision to Census Bureau on Adjusting Census 2000," June 14, 2000, attached as Exhibit G to the Currey

Declaration). When Secretary Daley proposed the existing regulation on June 14, 2000, he stated: " We want to make sure that when this important decision is made, it is made by experts based on sound, statistical science . . . . Politics shouldn't play any part in this decision, and this regulation is a way to ensure that it won't." (*Id*.) The existing rule -- promulgated pursuant to the notice and comment procedures set forth in the Administrative Procedure Act, and codified as 5 U.S.C. § 553 -- was issued as a final rule on Oct. 6, 2000. *See* 65 Fed. Reg. 59,713, 59,714 (Oct. 6, 2000) (codified at 15 C.F.R. pt. 101). (A copy of the rule is attached as Exhibit H to the Currey Declaration.)

However, in a move that ensures that ***politics, not science***, will now drive the final decision whether to release statistically adjusted census results, Secretary of Commerce Donald Evans proposed a rule on February 16, 2001, without notice and comment, purporting to revoke portions of 15 C.F.R. Part 101. (A copy of the Evans Rule is attached as Exhibit I to the Currey Declaration.) By its terms, the new Evans rule will take effect when published in the Federal Register, perhaps as soon as Thursday, February 22, 2001.

Sadly, Secretary Evans is of the view that politics *should* replace accuracy as the touchstone on this issue. The "Supplementary Information" released by the Commerce Department with the proposed new rule correctly notes the current acting Census Director, William Barron, is a career civil servant, not a political appointee. He thus is relatively immune from political pressure. In a press statement accompanying the release of the new rule, Secretary Evans stated his belief that decision-making authority "should reside with a person selected by the President, approved by the U.S. Senate and accountable to the people." (*See* U.S. Dep't of Commerce Press Release, "Statement of Secretary Donald L. Evans Regarding the 2000 Census," Feb. 16, 2001, attached as Exhibit K to the Currey Declaration.) Evans, a former campaign

chairman and prodigious fund-raiser for President Bush, will make the final decision, under his proposed rule. And he has made it clear that he will consider factors other than whether Census Bureau professionals believe adjusted figures will produce more accurate results; the Supplementary Information notes that the Secretary will consider input from unnamed "other individuals." Because neither the new rule nor the decision itself allows for notice and comment, Plaintiffs are not assured that their input will be sought or considered, and will have no record of what factors drove any decision that Secretary Evans might make.

Unfortunately for Plaintiffs, press reports indicate that the Bush administration has already cut a deal with House Republican leaders to block the adjustment of census data. During the presidential campaign, at least one press report cited Bush aids as saying "one of his first acts as president would be to block the bureau's release of census findings that are reached through sampling." (John Mercurio, "Bush May Face Census Battle; Clinton Could Quietly Leave Stamp on Redistricting," Roll Call, Dec. 7, 2000, a copy of which is attached as Exhibit L to the Currey Declaration.) Other reports quote House Republicans as stating the White House has "privately promised to block states from using sampled numbers to redraw any of the nation's 435 congressional districts." *See* Jim VandeHei, "Bush's Next Recount Battle: Should Census Tallies Be Adjusted," Wall St. J., Feb. 8, 2001, at A24, attached as Exhibit M to the Currey Declaration; Genaro C. Armas, "Raw Census Numbers Said to Be Used for Drawing Political Lines," AP Newswires, Feb. 8, 2001, attached as Exhibit N of Currey Declaration.) Republican Congressman Roy Blunt has said he does "'not believe there is any reason' that the president would change his mind and permit the use of 'statistical sampling' for redistricting." VandeHei, *supra*. Apparently, the proposed new Evans rule is the first step toward sealing a political deal that has already been struck.

As explained in more detail below, this purported revocation of the existing rule is invalid because it was done without notice and comment. The existing regulation is a substantive rule that was promulgated pursuant to notice and comment procedures. Accordingly, any revocation or revision of the rule also requires notice and comment. *See Shalala v. Guernsey Mem'l. Hosp*., 514 U.S. 87, 100, 115 S. Ct. 1232, 1239, 131 L. Ed. 2d 106 (1995); *Chief Probation Officers of Cal. v. Shalala*, 118 F.3d 1327, 1336 (9th Cir. 1997); *American Mining Congress v. Mine Safety & Health Admin*., 995 F.2d 1106, 1112 (D.C. Cir. 1993). The right to notice and comment is an important one: it allows interested parties such as Plaintiffs the right to be heard and to participate in agency decision-making, and helps ensure that agencies make informed decisions. See *American Hosp. Ass'n v. Bowen,* 834 F.2d 1037, 1044 (D.C. Cir. 1987). Defendants do not want notice and comment because they are seeking at the eleventh hour to derail correction of differential undercounting. They are up against a statutory deadline and it is simply not expedient to afford public notice and comment as required by law. But, for a host of reasons, Plaintiffs will be irreparably injured if the new rule is allowed to take effect in disregard of their right to notice and comment.

Description of Existing Rule and the Proposed New Rule.

THE EXISTING RULE.

As noted above, the Census Act requires the Department of Commerce to provide, by April 1, 2001, tabulations of population to states and localities for their use in redistricting. *See* 13 U.S.C. § 141(c). (These reports of tabulations are often referred to as Public Law 94-171 data). In a detailed report entitled "Accuracy and Coverage Evaluation; Statement of the Feasibility of Using Statistical Methods to Improve the Accuracy of Census 2000," attached as

Exhibit O to the Currey Declaration, the Director of the Census informed the Secretary of Commerce that use of statistical sampling to correct for differential undercounting was feasible, and that the decision whether to release statistically corrected data for use in the redistricting process would be made before the April 1, 2001 deadline. Indeed, because of the logistical challenge of assembling and providing the data, the decision as a practical matter must be made by early March. The Director of the Census' report was accepted by the Secretary of Commerce. (Currey Decl. Exh. 4.) The existing rule, 15 C.F.R. § 101, established a framework for making the decision whether to release statistically corrected data for redistricting, or only to release unadjusted census data.

The existing rule formalized an existing Census Bureau committee known as the Executive Steering Committee for A.C.E. Policy -- or ESCAP. Under the rule, ESCAP is comprised of specified senior career professionals at the Census Bureau. 15 C.F.R. § 101.1(b)(3). The ESCAP is charged by the rule with preparing a written report to the Director of the Census recommending whether or not to use statistical sampling to correct Census data when making the tabulations of population reported to States and localities pursuant to 13 U.S.C. § 141(c). 15 C.F.R. § 101.1(b)(1). The rule also requires that the ESCAP report "shall be released to the public at the same time it is delivered to the Director of the Census." 15 C.F.R. § 101.1(b)(2).

Significantly, the Secretary of Commerce delegated his authority to make the final determination regarding the methodology to be used in calculating these populations to the Director of the Census. This delegation is contained in the existing rule 15 C.F.R. § 101.1(a)(1)-(2). The rule further provides that the Director of the Census shall make this determination only after receiving the recommendation of the ESCAP. The determination of the Director of the

Census "shall not be subject to review, reconsideration, or reversal by the Secretary of Commerce." 15 C.F.R § 101.1(a)(4).

The "Supplementary Information" provided by the Department of Commerce when the existing rule was proposed makes it abundantly clear that the rule delegating this decision to the Director of the Census is a substantive one, designed to insulate the decision from partisan politics:

[B]ecause this decision turns entirely on operational and methodological implementation within the expertise of the Bureau of the Census -- whether the use of sampling is possible, *i.e.*, compatible with statutory and resource constraints and with other aspects of the decennial census operational plan and is expected to improve the overall accuracy of the census as discussed in Accuracy and Coverage Evaluation, the decision must be made by the experts at the Census Bureau. The proposed rule therefore endows the Director of the Census with final authority to make this determination. *Review of the Director's decision by the Secretary of Commerce would at a minimum create an appearance that considerations other than those relating to statistical science were being taken into account, and could well allow the decision to be based on such irrelevant considerations. There is absolutely no rule for non-scientific considerations in this process. In order to safeguard both the substance and the public credibility of this decision-making process, we must leave the decision to the expert judgment of the Bureau of the Census.*

65 Fed. Reg. 38370 (emphasis added) (attached as Exhibit J to the Currey Declaration).

Existing law already provides that -- whether or not the Director of the Census decides to use statistical sampling to produce the population tabulations required by 13 U.S.C.

§141(c) -- unadjusted data must also be released. Pub. L. No. 105-119, § 209(j), 111 Stat. 2440. The existing rule similarly adds a separate requirement: If the ESCAP recommends adjustment of the data using statistical sampling, but the Director of the Census decides otherwise, the Census Bureau must nevertheless prepare and release statistically adjusted data at the same time it releases unadjusted data. 15 C.F.R. § 101.2(b). This is a substantive rule designed to ensure access to the most accurate data available. We are not aware of any other provision of law that would require the same result.

The existing rule was issued with notice and comment. The Department received 17 letters in support of the proposed rule, which reflected a total of 243 signatories. *See* Supplemental Information, 65 Fed. Reg. 59713, 59714. Among those supporting the rule were four former Census directors, who served six Presidents of both parties. The Department received seven letters in opposition to the proposed rule with a total of 12 signatories. As required by the Administrative Procedure Act, there was a 30-day delay between when the final rule was published in the Federal Register and when it became effective.

Secretary Evans' Rule

Without any notice or opportunity for comment, Secretary Evans promulgated the proposed new rule on February 16, 2001. It revokes the delegation of authority to the Director of the Census to make the final decision regarding the release of adjusted figures. In addition, the new rule would eliminate in its entirety 15 C.F.R. § 101.2(b), which guarantees that adjusted data will be released to the public if ESCAP determines that adjusted data is the most accurate. Furthermore, the "Supplementary Information" to the rule provides that the "Secretary, in his discretion, might also seek the advice of other individuals with knowledge of this issue." (Evans Rule, Currey Decl. Exh. I.) Thus, the proposed Evans Rule would undo the nonpolitical decision

making process ensured by 15 C.F.R. Part 101, allowing irrelevant factors other than statistical science to be taken into account.

Although 15 C.F.R. Part 101 was promulgated pursuant to notice and comment, the proposed new Evans rule claims that the revocation is a "rule of agency organization, procedure and practice and is not subject to the requirement to provide prior notice and an opportunity for public comment." The new Evans rule further states that it "is not a substantive rule," and thus there is no requirement for a 30-day delay in effective date under 5 U.S.C. § 553(d).

The Court should issue a temporary restraining order.

Pursuant to Fed. R. Civ. P. 65(b), this Court may issue a temporary restraining order where it clearly appears that immediate and irreparable injury will result unless the order is issued. Such relief is appropriate where, as here, the applicant has demonstrated either (1) a combination of probable success on the merits and the possibility of irreparable harm, or (2) that serious questions are raised and the balance of hardships tips in the applicant's favor. *Oakland Tribune, Inc. v. Chronicle Publishing Co.,* 762 F.2d 1374, 1376 (9th Cir. 1985) ("[T]hese two formulations represent two points on a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases."). Plaintiffs are entitled to a TRO under either test.

This Court has express statutory authority to issue a temporary restraining order and preliminary injunction in order to preserve the status quo. The Administrative Procedure Act, 5 U.S.C. § 705, provides in relevant part:

On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court . . . may issue all necessary and appropriate process to

postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

Plaintiffs are likely to succeed on their claim for a declaration that the proposed new rule is invalid because it was not promulgated pursuant to the notice and comment procedures as required under the Administrative Procedure Act.

Plaintiffs seek a declaration that the proposed new rule is invalid under the Administrative Procedure Act ("Act" or "APA"), codified as 5 U.S.C. §§ 551 et seq., because it was not promulgated pursuant to notice and comment as required by 5 U.S.C. § 553, and request that the publication of the rule be enjoined and/or the Secretary be enjoined from implementing the rule. *See* 5 U.S.C. § 703 (authorizing any applicable form of legal action, including actions for declaratory judgments and injunctions).

Plaintiffs satisfy the requirements for bringing a suit under the Administrative Procedure Act.

Plaintiffs have a right of judicial review under section 10(a) of the APA because they have been "adversely affected or aggrieved" by a final agency action. *See* 5 U.S.C. § 702, 704. The promulgation of a proposed final rule, as Secretary Evans did here, is considered "final agency action," and thus judicially reviewable under the Administrative Procedure Act. *See Sierra Pac. Indus. v. Lyng*, 866 F.2d 1099, 1105 (9th Cir.1989). Plaintiffs have been adversely affected by this final agency action because:

As discussed more fully below, they have been deprived of the right to notice and comment guaranteed by 5 U.S.C. § 553;

Under the existing rule, Plaintiffs are entitled to a decision based solely on statistical science, divorced from politics. The decision "turns entirely on operational and methodological implementation within the scientific expertise of the Bureau of the Census", and it is important to avoid even the appearance that considerations other than those relating to statistical science were being taken into account.… *There is absolutely no role for non-scientific considerations in this process".* 65 Fed. Reg. 38370 (June 20, 2000) (emphasis added). The right to an impartial, scientifically-based decision is revoked by the new rule and replaced by an *ad hoc* free-for-all of

ex-parte contacts and partisan lobbying. Secretary Evans has made it clear that he will consult "others," but has left plaintiffs to guess who those "others" may be, and whether their concerns will be given a fair hearing, or any hearing at all.

Under the existing rule, if ESCAP -- the committee of senior census professionals -- recommends statistical correction of census data, but the Census Director rejects that recommendation, the Census Bureau must nevertheless prepare and release adjusted census results. While these would not be the "official" census results, the information could still be used for distribution of federal funds, if Congress could be persuaded to allow it. Also, because the census professionals best-positioned to know would have decided that the statistically corrected population tabulating are the most accurate available, they could and would be used for the drawing of congressional, legislative, or in some cases local districts. *See Kirkpatrick v. Preisler*, 394 U.S. 526, 527-28, 531, 535-36 (1969) (indicating that census data may be adjusted for intrastate redistricting if justified); *Karcher v. Daggett*, 462 U.S. 725, 738 (1983) (same). The proposed new rule revokes that portion of the existing rule, leaving Plaintiffs with no legal right to obtain statistically adjusted census results if the ESCAP recommends adjustment, but the Secretary -- as expected -- refuses.

In order to have standing under the APA, Plaintiffs' interest must be "arguably within the zone of interests to be protected or regulated by the statute." *See Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153, 90 S. Ct. 827, 830, 25 L. Ed. 2d 184 (1970); *Presidio Golf Club v. National Park Service*, 155 F.3d 1153, 1158 (9th Cir. 1998). The zone of interests test is "not a demanding one." *See Chief Probation Officers of Cal. v. Shalala*, 118 F.3d 1327, 1331 n.2 (9th Cir. 1997). Certainly Plaintiffs' interest in obtaining the right to notice and comment, as well as their interest in the substance of the decision whether to release the census figures determined by the ESCAP to be the most accurate, fall inside the zone of interests protected or regulated by the APA, the Census Act, and 15 C.F.R. Part 101.

Plaintiffs also easily satisfy the requirements for Article III standing. For the reasons explained above, Plaintiffs have suffered a concrete injury-in-fact that is "fairly traceable" to the revocation of portions of 15 C.F.R. Part 101, and which can be redressed by a favorable decision by this Court. *See Bennett v. Spear*, 520 U.S. 154, 167, 117 S. Ct. 1154, 1163, 137 L. Ed. 2d 281 (1997); *Presidio Golf Club*, 155 F.3d at 1157. That Plaintiffs were denied notice and an opportunity to comment on a rule that adversely affects them is alone an

injury sufficient to satisfy Article III standing. *See Yesler Terrace Cmty Council v. Cisneros*, 37 F.3d 442, 445-47 (9th Cir. 1994) (holding that tenants deprived of notice and opportunity to comment on HUD rule that dispensed with certain grievance hearings satisfied Article III standing).

Because 15 C.F.R. Part 101 is a substantive rule it can only be revoked or revised through notice and comment.

Substantive rules, as opposed to interpretive rules or rules of agency procedure and practice, create rights, impose obligations, or effect a change in existing law. *See Yesler*, 37 F.3d at 449. Substantive rules (also called "legislative rules") require notice and opportunity for comment pursuant to 5 U.S.C. § 553. *See* Kenneth Culp Davis & Richard J. Pierce, Jr., Administrative Law Treatise § 6.3 (3d ed. 1994). An amendment to, or revocation of, a legislative rule, must itself be legislative. *See Shalala,* 514 U.S. 87 at 100; *American Mining Congress,* 995 F.2d at 1112 (stating that one of four situations in which a rule is a legislative rule is if it effectively amends a prior legislative rule); *Chief Probation Officers*, 118 F.3d at 1336.

15 C.F.R. Part 101 is a substantive rule, and therefore in order to amend or revoke it, the Secretary Evans and the Commerce Department were required to give notice and provide an opportunity for comment, which, of course, they failed to do. First, it was adopted using the notice and comment procedures ordinarily reserved for substantive rules. Usually, that would be evidence that the rule is substantive, but not dispositive. *Louisiana – Pacific Corp. v. Block*, 694 F.2d 1205, 1210 (9th Cir. 1982). In this instance,, however, the materials accompanying the promulgation of the rule expressly referred to safeguarding "The substance" of the decision making process. Second, and more important, §§ 101.1 and 101.2 effected a change in existing

law. Section 101.2(b) created a right that did not exist before the rule -- a right to receive statistically adjusted data if the ESCAP recommends that sampling should be used. Third, section 101.1(b)(2) requires that ESCAP's report be released to the public. Before this rule was promulgated, the public did not have a right to the ESCAP report. Fourth, the rule is intended to ensure that the decision whether to correct the data is driven solely by "statistical science" and not politics: "[t]here is absolutely no role for non-scientific considerations in this process." 65 Fed. Reg. 38370. Thus, 15 C.F.R. Part 101 is a legislative rule because it conclusively affects the substantive rights of plaintiffs by giving them access to the census data deemed most accurate by ESCAP, as well as the ESCAP report, and the right to have the decision whether to correct the data based on science, not politics. *See Yesler*, 37 F.3d at 449; *Takhar v. Kessler*, 76 F.3d 995, 1002 (9th Cir. 1996).

The Secretary contends that the new rule is not subject to the notice and comment requirement of 5 U.S.C. § 553 because it is a "rule of agency organization, procedure and practice." (Evans Rule, Currey Decl. Exh. I.) It is true that section 553(b)(A) exempts "rules of agency organization, procedure, or practice" from the requirement of notice and comment. 5 U.S.C. § 553(b)(A). It is also true that internal delegations of authority that otherwise do not impact the public are not substantive rules and do not require notice and comment. *See, e.g., United States v. Saunders*, 951 F.2d 1065, 1068 (9th Cir. 1991; *Lonsdale v. United States,* 919 F.2d 1440, 1446 (10th Cir. 1990). But, for the reasons set forth below, the "agency organization, procedure and practice" exception simply cannot apply to the proposed new rule.

First of all, because of the important policies advanced by Section 553, exceptions to its notice and comment requirement are narrowly construed.

The essential purpose of according § 553 notice and comment opportunities is to

reintroduce public participation in fairness to affected parties after governmental authority has been delegated to unrepresentative agencies. . . . Section 553 was enacted to give the public an opportunity to participate in the rule-making process. It also enables the agency promulgating the rule to educate itself before establishing rules and procedures which have a substantial impact on those who are regulated.

Batterton v. Marshall, 648 F.2d 694, 703-704 (D.C. Cir. 1980) . (footnotes omitted).

Exemptions should be narrowly construed and recognized "only where the need for public participation is overcome by good cause to suspend it, or where the need is too small to warrant it, as for example, when the action in fact does not conclusively bind the agency, the court, or affected private parties." *Id.* at 704 (footnotes omitted). *See also Alcaraz v. Block,* 746 F.2d 593 (9th Cir. 1984) ("The exceptions to section 553 will be 'narrowly construed and only reluctantly countenanced.'"); *Baylor Univ. Med. Ctr. v. Heckler,* 758 F.2d 1052, 1058-59 (5th Cir. 1985).

Here, the proposed new rule does far more than affect only "agency organization, procedure and practice." The original delegation of authority to the Director of the Census was intended to accomplish much more than a mere change in the identity of the person who would make the decision. Rather, as noted above, it was implemented in order to ensure that the decision would be based solely on "statistical science" and to insulate the decision-making process from "irrelevant" political considerations. The agency took pains to state that there "is *absolutely no role* for non-scientific considerations in this process." 65 Fed. Reg. 38370 (June 20, 2000) (emphasis added). Indeed, the Department of Commerce felt so strongly about the issue that it concluded that in "order to safeguard both the substance and the public credibility of

this decision-making process, we *must* leave the decision to the expert judgment of the Bureau of the Census." *Id.*

Moreover, the proposed new rule revokes a right established for the first time by the existing rule to obtain adjusted census data if the ESCAP determines that the data should be adjusted. Under the existing rule, the adjusted data must be released even if the Census Director ultimately determines not to release the adjusted figures. The new rule simply does away with that requirement in its entirety. This has nothing to do with "agency organization, procedure and practice." The Ninth Circuit has held that an agency may not rely upon this exemption to the notice and comment requirement where the new rule is "not merely a procedural nicety." *Sequoia Orange Co. v. Yeutter*, 973 F.2d 752, 759 (9th Cir. 1992).

Finally, the existing rule sets out a specific procedure to ensure that the decision is based on a recommendation by respected career statisticians at the Census Bureau. The new rule substitutes a non-process, with the Secretary consulting unnamed "others" and basing his decision on partisan politics. Plaintiffs and others affected by the decision have no means of ensuring that their concerns are heard or that the decision will be based on the touchstone of accuracy. In a similar situation, the Ninth Circuit struck down a rule over the agency's objection that it was exempt from the notice and comment requirement:

> Many of the problems that Sequoia complains of, the *ex-parte* contacts, the consideration of improper factors, . . . and political pressure, would have been avoided or diminished by following the APA's procedures. . . . [T]he appearance and integrity of the decision-making process would have benefited from a more formal procedure.

Yeutter, 973 F.2d at 758. The same is true here. 2

Plaintiffs will suffer immediate irreparable harm unless this Court enjoins the

implementation of the February 16, 2001, Evans Rule.

The Plaintiffs will be irreparably injured if the proposed new rule takes effect. Their injuries were discussed in detail in section IIA(1) of this Memorandum. 15 C.F.R. Part 101 created a nonpolitical decision making process to govern the release of adjusted figures -- in addition to creating other substantive rights -- that ensured that Los Angeles and the other plaintiffs would have access to the most accurate census data. The proposed Evans Rule, if implemented, will irreparably harm Plaintiffs because they will be deprived of their right to notice and comment. The new rule inserts otherwise prohibited political consideration into the decision making, and strips plaintiffs of their rights to obtain the most accurate census data possible. Given that the decision whether adjusted figures should be released must be made by early March, plaintiffs risk imminent irreparable harm if the new rule is not enjoined. Indeed, the very purpose of the rule appears to be to snatch the decision from the hands of dispassionate statisticians at the eleventh hour, and to squelch their effort to offer the most accurate date possible – all for partisan political purposes.

The balance of hardship weighs decidedly in favor of plaintiffs, as does the public interest.

If the new Evans rule is not enjoined, Plaintiffs will suffer irreparable harm, as discussed above. On the other hand, the Secretary and the Department of Commerce will lose nothing if the injunction issues.

The public interest favors issuance of injunctive relief. It is not only these Plaintiffs that have a right to the most accurate census data possible and a nonpolitical decisionmaking process to ensure that the most accurate figures are released. The public interest would undoubtedly be served by keeping a highly technical decision, which is critical to our

democracy and the fundamental principles of equal representation, in the hands of skilled professionals. Release of the most accurate data possible will best serve the public interest.

Conclusion

For the foregoing reasons, Plaintiffs respectfully requests the Court to enter a temporary restraining order and an order requiring Secretary Evans to show cause why a preliminary injunction should not issue prohibiting the effectiveness and/or implementation of the new rule.

Dated: February 21, 2001
Respectfully submitted,

BRIAN S. CURREY
O'MELVENY & MYERS, LLP
By

[redacted]

..1 In anticipation that corrected figures would be used, Congress has mandated that the Census Bureau also release uncorrected figures. *See* Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-119, § 209(j), 111 Stat. 2440 (1997). (A copy of § 209 is attached as Exhibit E to Currey Declaration.)

...2 Part 101.1(a)(9) of the existing rule, which provides in relevant part that "[n]othing in this section shall diminish the authority of the Secretary of Commerce to revoke or amend this delegation of authority" and that the delegation "shall remain in effect unless or until amended or revoked" cannot, of course, excuse compliance with the requirements of the Administrative Procedure Act. An agency cannot, by rule, excuse itself from compliance with a statute. Any that was not the intent of the quoted language. The "Supplementary Information" to the existing rule makes it clear that the delegation could be revoked by issuing another rule, but such a rule would only be effective "if it satisfied the requirement of the Administrative Procedure Act and other applicable legal stands. 15 C.F.R. Part 101, Supplementary Information, 65 Fed. Reg. at 59715.

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CITY OF LOS ANGELES; CITY OF SAN ANTONIO, TEXAS; CITY OF INGLEWOOD, CALIFORNIA; COUNTY OF SANTA CLARA, CALIFORNIA; CITY OF STAMFORD, CONNECTICUT; LAURA CHICK, individually and in her official capacity as a Member of the Los Angeles City Council; MIKE FEUER, individually and in his official capacity as a Member of the Los Angeles City Council; MIKE HERNANDEZ, individually and in his official capacity as a Member of the Los Angeles City Council; NATE HOLDEN, individually and in his official capacity as a Member of the Los Angeles City Council; CINDY MISCIKOWSKI individually and in her official capacity as a Member of the Los Angeles City Council; NICK PACHECO individually, and in his official capacity as a Member of the Los Angeles City Council; ALEX PADILLA, individually and in his official capacity as a Member of the Los Angeles City Council; RITA WALTERS, individually and in her official capacity as a Member of the Los Angeles City Council; MARK RIDLEY-THOMAS, individually and in his official capacity as a Member of the Los Angeles City Council; FERNANDO FERRER, President of Bronx Borough, New York City, New York,
Plaintiffs,
v.
DONALD EVANS, SECRETARY OF THE DEPARTMENT OF COMMERCE, in his official capacity; DEPARTMENT OF COMMERCE,
Defendants.

Case No. CV01-01671 GAF (MCx)
DECLARATION OF BRIAN S. CURREY IN SUPPORT OF EX PARTE APPLICATION FOR TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE RE PRELIMINARY INJUNCTION

I, Brian Currey, declare and state:

I am an attorney admitted to practice before this Court, and am the principle attorney representing plaintiffs in this action. I have personal knowledge of the facts set forth herein.

On Wednesday, February 21, 2001, at approximately 9:00 a.m., Pacific Time, I called Alden F.

Abbott, acting General Counsel, United States Department of Commerce, at his office in Washington, D.C. I informed Mr. Abbott that the plaintiffs in this action would be filing a lawsuit today, alleging that the new rule at issue in this litigation should have been adopted using notice and comment procedures under the Administrative Procedure Act, and that we would be seeking a temporary restraining order and preliminary injunction against the effectiveness and implementation of the rule. I told Mr. Abbott that I would get back to him concerning the identity of the judge to whom the case was assigned, and provide him with any further information I could obtain from the courtroom clerk, or chambers, of the judge to whom the case was assigned concerning the handling of our *ex parte* application, but that we intended to proceed as quickly as possible. Mr. Abbott thanked me for my courtesy, and suggested that I also contact the Federal Programs Branch at the United States Department of Justice. Mr. Abbott agreed to accept service on behalf of Secretary of Commerce Donald Evans and the United States Department of Commerce, by fax and overnight service of process.

At approximately 9:15 a.m. on February 21, 2001, I spoke by telephone with Thomas Millet, an attorney with the Federal Programs Branch of the United States Justice Department in Washington, D.C. Mr. Millet informed me that he would be handing the litigation for the Department of Justice, and that I should communicate with him. I told Mr. Millet that we would be filing a Complaint and *Ex Parte* Application for Temporary Restraining Order and Order to Show Cause Re Preliminary Injunction today, and explained the claims and nature of the relief we would be seeking and that I would provide him with copies of the papers filed. We agreed that I should communicate with the courtroom clerk or chambers of the judge to whom the case would be assigned, and share with Mr. Millet any information I receive concerning the handling of our *Ex Parte* Application. Mr. Millet informed me that his office would be opposing the

issuance of a temporary restraining order, and would like the opportunity to submit papers and, in the event a hearing is held, to participate by telephone.

At approximately 11:45 a.m. on February 21, 2001, I spoke by telephone to Leon Wideman, Chief of the Civil Division of the U.S. Attorney's Office in Los Angeles, and Assistant U.S. Attorney Roger West advising them of the pendency of the lawsuit, theory of the case, and the fact that we would be applying for a Temporary Restraining Order and Order to Show Cause Re Preliminary Injunction. I again advised that I would keep them posted concerning the assignment of the case and any further information I learn concerning processing of the *Ex Parte* Application, and provide them with copies of the papers filed.

I have attached what I believe to be true and correct copies of the attached exhibits.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 21st day of February, 2001 at Los Angeles, California.

Brian S. Currey

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CITY OF LOS ANGELES; CITY OF SAN ANTONIO, TEXAS; CITY OF INGLEWOOD, CALIFORNIA; COUNTY OF SANTA CLARA, CALIFORNIA; CITY OF STAMFORD, CONNECTICUT; LAURA CHICK, individually and in her official capacity as a Member of the Los Angeles City Council; MIKE FEUER, individually and in his official capacity as a Member of the Los Angeles City Council; MIKE HERNANDEZ, individually and in his official capacity as a Member of the Los Angeles City Council; NATE HOLDEN, individually and in his official capacity as a Member of the Los Angeles City Council; CINDY MISCIKOWSKI individually and in her official capacity as a Member of the Los Angeles City Council; NICK PACHECO individually, and in his official capacity as a Member of the Los Angeles City Council; ALEX PADILLA, individually and in his official capacity as a Member of the Los Angeles City Council; RITA WALTERS, individually and in her official capacity as a Member of the Los Angeles City Council; MARK RIDLEY-THOMAS, individually and in his official capacity as a Member of the Los Angeles City Council; FERNANDO FERRER, President of Bronx Borough, New York City, New York, Plaintiffs, v. DONALD EVANS, SECRETARY OF THE DEPARTMENT OF COMMERCE, in his official capacity; DEPARTMENT OF COMMERCE, Defendants.	Case No. **CERTIFICATION AS TO INTERESTED PARTIES**

The undersigned, counsel of record for plaintiff City of Los Angeles, certifies that the following listed party has a direct interest in the outcome of this action. These representations are made to enable the Court to evaluate possible disqualification or recusal:

Plaintiffs: City of Los Angeles; City of San Antonio, Texas; City of Stamford,

Connecticut; City of Inglewood, California; County of Santa Clara, California; Laura Chick, individually and in her official capacity as a Member of the Los Angeles City Council; Mike Feuer, individually and in his official capacity as a Member of the Los Angeles City Council; Mike Hernandez, individually and in his official capacity as a Member of the Los Angeles City Council; Nate Holden, individually and in his official capacity as a Member of the Los Angeles City Council; Cindy Miscikowsky, individually and in her official capacity as a Member of the Los Angeles City Council; Nick Pacheco, individually and in his capacity as a Member of the Los Angeles City Council; Alex Padilla, individually and in his official capacity as a Member of the Los Angeles City Council; Rita Walters, individually and in her official capacity as a Member of the Los Angeles City Council; Mark Ridley-Thomas, individually and in his official capacity as a Member of the Los Angeles City Council; Fernando Ferrer, President of Bronx Borough, New York City, New York.

Defendants: Donald Evans, in his official capacity as Secretary of Commerce; United States Department of Commerce.

Other: Not applicable.

Dated: February 21, 2001
Respectfully submitted,

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O'MELVENY & MYERS, LLP
By

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Defendants: Donald Evans, in his official capacity as Secretary of Commerce; United States Department of Commerce.

Other: Not applicable.

Dated: February 21, 2001
Respectfully submitted,

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Defendants: Donald Evans, in his official capacity as Secretary of Commerce; United States Department of Commerce.

Other: Not applicable.

Dated: February 21, 2001
Respectfully submitted,

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